cargo are, under such circumstances, liable for a false and fraudulent representation by the master.

The result, therefore, is, that the verdict is to be entered for the plaintiffs in the first action for 645*l.* 15*s.*, with interest from the 18th August, 1855, on the issue on the first count, and that, as to the other issues the jury be discharged; and, as to the second action, that the judgment be for the defendants.

In the Court of Exchequer, April, 1857.

DYNEN *vs.* LEACH.[1]

1. Where an injury happens to a servant while in the actual use of an instrument, engine or machine, in the course of his employment, of the nature of which he is as much aware as his master, and the use of which is, therefore, the proximate cause of the injury, he cannot, at all events if the evidence is consistent with his own negligence in the use of it being the real cause, nor in case of his dying from the injury can his representative, under Lord Campbell's act 9 & 10 Vict. c. 93, recover against his master, there being no evidence that the injury arose through the personal negligence of the master. Nor is it any evidence of such personal negligence of the master that he has in use in his works an engine or machine less safe than some other which is in general use.
2. Therefore, where a laborer was killed through the fall of a weight which he was raising by means of an engine to which he attached it by fastening on to it a clip, and the clip had slipped off it, it was held that there was no case to go to the jury in an action by his representative against the master, although it appeared that another and safer mode of raising the weights was usual, and had been discarded by the orders of the defendant.

This was an action, brought in the Passage Court of Liverpool, by an administratrix, under Lord Campbell's Act, 9 & 10 Vict. c. 93,[2] which provides for compensation to the families of persons killed by accident.

The declaration stated that the intestate was a servant of the

[1] 26 Law Jur. 221 Ex.

[2] A Similar act has been passed in many of the States of the Union. See 1 Tidd's Prac., 9. 3d Am. Ed. notes.

defendant, employed by him in his business as a sugar-refiner, on the terms that the defendant would take due and ordinary care that the intestate should be exposed to no extraordinary risk in the course of his said service; but that the defendant wrongfully exposed him to extraordinary risk in the said employ, so that, through the carelessness of the defendant, a sugar-mould fell upon the intestate while he was engaged in the said service and caused his death.

Pleas—First, not guilty; second, a denial that the intestate was employed on the terms stated.

At the trial, the plaintiff's counsel stated the case thus:—That the defendant was a sugar-refiner, and had employed the intestate as a laborer; that it was part of the intestate's duty to fill the sugar-moulds and hoist them up to higher floors in the warehouse by means of machinery; that the usual mode of attaching the moulds to the machine was by placing them in a sort of net-bag, and which effectually prevented any accident; that this was the mode adopted by the defendant until, from motives of economy, he substituted a kind of clip, which laid hold of the rim of the mould; that the deceased, on the occasion in question, had himself filled the mould, and fastened it to the clip, but that, when it was being raised, the clip, by some jerk, slipped off the mould, which fell on his head and killed him. The learned judge on this statement, nonsuited the plaintiff, but gave him leave to move to set the nonsuit aside.[1]

C. Blackburn, now moved according to the leave reserved.

MARTIN, B.—Does not the case come within the principle of *Priestley* vs. *Fowler*,[2] and the class of cases decided upon it[3]?

POLLOCK, C. B.—These cases show that the deceased could not have recovered against his master for an injury caused by the negligence of a fellow-servant[4]; can his representative, then, recover for a death caused by his own negligence? He himself fixed the clip.

[1] And stated and signed a case for the purpose, of which the above is the substance.

[2] 3 Mee. & W. 1; s. c. 7 Law J. Rep. N. S, Exch. 42.

[3] *Vide* Wigmore *vs.* Jay, 19 Law J. Rep. N. S. Exch. 300.

[4] And the representative cannot recover for the death in a case in which the deceased could not have recovered for an injury, *vide supra, et vide* Hutchinson *vs.* the York, Newcastle and Berwick Railway Company, 19 Law J. Rep. N. S Exch. 296

The negligence imputed is not in the way of fixng the clip, or in the manner of using it, but in the use of it at all. It is not the usual mode, and not a proper mode of raising the mould.

BRAMWELL, B.—As to its not being usual, that is immaterial. It was unsafe.

POLLOCK, C. B.—Then the deceased should not have used it.

There is a recent case in the House of Lords which seems to show that it was the duty of the master not to have adopted such a mode —*Patterson* vs. *Wallace*.[1] There, in an appeal on a Scotch case, the Lord Chancellor, in giving judgment, said that the law in England and Scotland on the subject was the same; and that when a master employed his servant in a work which was dangerous, he was bound to take all reasonable precautions for the safety of his workman.

POLLOCK, C. B.—That was an *obiter dictum* as regards the law of England; the appeal being from Scotland.

No doubt, it is no direct decision on the question, but is a weighty expression of opinion.

POLLOCK, C. B.—But it must be taken with reference to the facts.

The master was a miner; the workman had pointed out that a stone overhanging the works was dangerous and likely to fall, and it did fall soon after and killed him. The House of Lords held,

[1] 1 M'Queen's Reports of Scotch cases in the House of Lords. 748. See also Brydon *vs.* Stewart, 2 Ibid. 30, in which the Solicitor General (for the defendant, the master,) citing the former case, says "the law of both countries on questions of this sort is the same, except that in Scotland it would appear that a master is responsible for injuries done by a fellow workman; and the Lord Chancellor in giving judgment said, 'a master by the laws of both countries is liable for accidents occasioned by his neglect towards those whom he employs.'" There the action was by the representatives of a miner who had been killed by the fall of a stone upon him while he was being drawn up through the shaft of the mine, "the stone falling by reason of the shaft being in an unsafe state from causes for which the master, the defendant, was responsible." That was the form of the issue on which the jury found for the complainant. See as to the difference between the law of England in such cases as regards master and servant, Seymour *vs.* Madox, 20 Law J. Rep. N. S. Q. B. 327, Hutchinson *vs.* the York, Newcastle and Berwick Railway Company, 19 Law J. Rep. N. S. Exch. 296; and as regards strangers, Reedie *vs.* the London and North-Western Railway Company, 4 Exch. Rep. 244, Barnes *vs.* Ward, 9 Com. B. Rep. 392; s. c. 19 Law J. Rep. N. S. C. P. 115.

that, by the law of Scotland, there was a case to go to the jury So there was in the present case.

BRAMWELL, B.—The case is clearly distinguishable.

In circumstances, but not in principle.

BRAMWELL, B.—There the workman had no connection or concern with the cause of accident, whereas here he was in the actual use of it.

No doubt; but it was not his fault that it was perilous.

POLLOCK, C. B.—There was no contract, and there was no general duty thrown by law upon the master to the effect stated in the declaration. If the work is more than ordinarily dangerous, the servant should know it and decline to continue in it.

There is no legal presumption that an unskilled laborer should know the nature of machinery employed.

POLLOCK, C. B.—Every workman is bound to know the nature of the instrument he uses. Even a hammer or a ladder may be dangerous.

It was surely for the jury whether the particular mode of raising the mould was unsafe, and whether the deceased could know it?

POLLOCK, C. B.—No; there was nothing for the jury. As to the method being usual, there was no evidence, except that a safer method had been used; but a master is not bound to use the safest method. A pair of steps is safer than a ladder, but business could not go on if ladders were discarded. And as to the man's knowledge, he was bound to know what he actually did; he himself fastened the clip, and it would be impossible for the jury to tell whether it was his careless mode of doing it which caused the accident.

It would be for the jury on the whole whether the method was reasonable and proper.

POLLOCK, C. B.—No; if the man did not think it so, he should have left. A servant cannot continue to use a machine he knows to be dangerous, at the risk of his employer.

He might not know it, and his means of knowledge would be a question for the jury.

POLLOCK, C. B.—No; it is a question of law.

BRAMWELL, B.—There was no evidence that the method was

improper; that it was less safe than another did not make it improper to be used.

POLLOCK, C. B.—The deceased not only contributed to the accident which caused his death, but did the act which directly caused it. It is impossible to speculate as to the cause, but it is consistent with the evidence that it was his own carelessness in fastening the clip. At all events, his own act was the proximate cause of the occurrence, and it is impossible to hold that to be a ground of action.

BRAMWELL, B.—There is nothing legally wrongful in the use by an employer of works or machinery more or less dangerous to his workmen, or less safe than others that might be adopted. It may be inhuman so to carry on his works as to expose his workmen to peril of their lives, but it does not create a right of action for an injury which it may occasion when, as in this case, the workman has known all the facts and is as well acquainted as the master with the nature of the machinery and voluntarily uses it. That was not so in the case cited from the House of Lords, in which the workman had nothing to do with the stone the fall of which was the proximate cause of the occurrence. Here on the contrary, the workman's own act was the proximate cause. Whether, therefore, on the principle that the party contributed to or was the proximate cause of the injury, or upon the principle that a servant cannot sustain an action against a master for the mere negligence of a servant, this action cannot be sustained.

CHANNELL, B.—If I were to speculate on the cause of the accident, I should be disposed to think that it was the careless fixing of the clip by the defendant himself. But we cannot speculate on that point; and I rest my judgment on the ground that the deceased himself continued in the employ of the defendant and in the use of the clip with full knowledge of all the circumstances, so that he directly contributed to the accident.[1]

[1] As to this defence, where the plaintiff has employed the defendant to do work, &c. see Dakin *vs.* Brown, 8 Com. B. Rep. 92, s. c. 18 Law J. Rep. N. S. C. P. 344; as to the personal negligence reputed to sustain such an action by a servant against his master, see the judgment in the recent case, Scott *vs.* the Mayor of Manchester, 26 Law Jour. Rep. p. 132, *vide* particularly, p. 134.